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March 14, 2006

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Ms. Deborah Platt Majoras
Chair
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, D.C. 20580

Dear Chairman Majoras:

We are writing to request that the Commission take a more active role in protecting competitive interests related to broadband Internet access services in the wake of the Supreme Court's recent *Brand X* decision. In the *Brand X* decision last year, the Supreme Court upheld the Federal Communications Commission ("FCC") finding that cable modem service is an "information service" and that broadband cable companies providing such service are exempt from mandatory common carrier regulation.¹ Shortly thereafter, the FCC adopted its *Wireline Broadband Internet Access Order*, which also deregulated broadband Internet access services offered by wireline incumbent local exchange carriers ("ILECs").²

Until these recent decisions in the Supreme Court and at the FCC, broadband Internet access services had been categorized as common carrier telecommunication services, pursuant to Title II of the Communications Act of 1934, as amended.³ Although the Federal Trade Commission ("FTC") is authorized by statute to take action against any entities that engage in anticompetitive, deceptive, and unfair commercial practices,⁴ it has been precluded

¹ National Cable & Telecommunications Ass'n v. Brand X Internet Services, 125 S. Ct. 2688 (2005).

² See Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853 (2005), consolidated appeal pending *sub nom Time Warner v. FCC*, 05-4769 (3rd Cir. Oct. 26, 2005). Petitions for reconsideration are also pending before the FCC. ("*Wireline Broadband Internet Access Order*").

³ 47 U.S.C. § 201 *et seq.* Among other things, Title II required broadband Internet access providers under its purview to provide service in a just and reasonable manner. *Id.*

⁴ See 15 U.S.C. § 45(a)(1) (unfair competition and unfair or deceptive acts or practices); 15 U.S.C. §§ 12-27 (unlawful tying, mergers and acquisitions, interlocking directorates); 15 U.S.C. §§ 13, 13b, and 21a (discriminatory pricing and product promotion).

from exercising its full jurisdiction over broadband Internet access services by virtue of the “common carrier exemption” found in the Federal Trade Commission Act.⁵ The common carrier exemption requires the FTC to defer to the FCC in regulating consumer protection and competition issues related to telecommunications common carriers.

Because cable and ILEC broadband Internet access services have been reclassified as “information services” by the Supreme Court and FCC, there is some question regarding the continued application of the common carrier preemption of FTC jurisdiction over such services. This ambiguity may well extend to Voice over Internet Protocol (“VoIP”) services, as the FCC has yet to decide whether VoIP should be classified as a common carrier service.⁶

The FCC has taken various steps to regulate the otherwise deregulated broadband Internet access services under its “ancillary jurisdiction” derived from Title I of the Communications Act.⁷ For example, the FCC has imposed Communications Assistance for Law Enforcement Act (“CALEA”) requirements on broadband providers,⁸ and has required broadband Internet access providers to comply with Section 255 of the Communications Act of 1934, to help ensure accessibility to broadband Internet access by the disabled.⁹ A rulemaking proceeding to consider other consumer-related regulation of broadband Internet access services pursuant to Title I is also pending before the FCC.¹⁰

While the FCC has taken these steps to protect national security interests and broadband consumers, the FCC’s existing and prospective Title I regulation of broadband Internet access services still leaves several potential statutory and regulatory gaps in federal protection of

⁵ 15 U.S.C. § 45(a)(2).

⁶ It appears that the FTC has at least begun to fill the void by expressing a willingness to take enforcement actions against VoIP providers that violate FTC rules. See “FTC FACTS for Consumers: VoIP, It’s a Phone, It’s a Computer, It’s . . .,” issued August 2005, available at <http://www.ftc.gov/bcp/online/pubs/online/voip.pdf>.

⁷ 47 U.S.C. § 151 *et seq.* The propriety of the FCC’s expanding use of Title I ancillary jurisdiction has been called into question. See *American Library Assoc. v. Motion Picture Assoc. of America*, No. 04-1037, at 18 (D.C. Cir. 2005) (rejecting Commission exercise of Title I authority as “*ultra vires*” because “the FCC’s interpretation of its ancillary jurisdiction reaches well beyond the agency’s delegated authority under the Communications Act”).

⁸ Communications Assistance for Law Enforcement Act and Broadband Access and Services, First Report and Order and Further Notice of Proposed Rulemaking, 20 FCC Rcd 14989 (2005), consolidated appeal pending *sub nom American Council on Education v. FCC*, 05-1404 (D.C. Cir. Oct. 24, 2005).

⁹ Wireline Broadband Internet Access Order ¶108.

¹⁰ *Id.* ¶¶146-59.

competitive interests. These consumer and competitive issues are vitally important to the leadership of the United States in terms of innovation and broadband deployment and impact the "Net Neutrality" freedoms that are currently being discussed and considered by Congress. The FTC has a proud tradition of protecting the interests of consumers and competition in the United States. In light of this tradition, I request your response to the following questions:

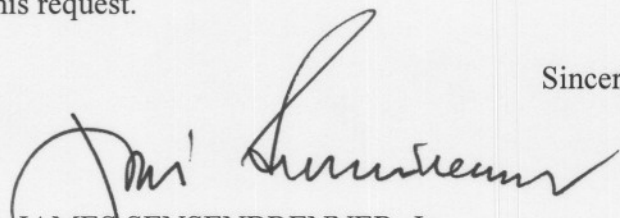
- Does the FTC interpret the *Brand X* decision and the *Wireline Broadband Internet Access Order* to have shifted any responsibilities from the FCC to the FTC?
- What are the FTC's views with regard to the FCC's exercise of Title I ancillary authority over broadband Internet access services?
- Due to the *Brand X* decision and the *Wireline Broadband Internet Access Order*, does the FTC view itself as the federal agency with primary jurisdiction over consumer protection and competition issues related to broadband Internet access in the United States? If so, does this also apply in circumstances in which providers can choose whether or not they are common carriers? Also, please explain the extent of the FTC's current jurisdiction over broadband Internet access services.
- Does the FTC intend to exercise regulatory jurisdiction over broadband Internet access services provided by cable companies and ILECs, including complaints from consumers, content providers, and other affected parties?
- Has the FTC communicated with the FCC about jurisdictional responsibilities related to broadband Internet access service? If so, what was the content and outcome of those discussions?
- Has the FTC ever addressed and resolved an issue related to broadband Internet access? Are any complaints, actions, or proceedings that relate to broadband Internet access services currently pending before the FTC? If so, please describe.
- Does the FTC intend to open a proceeding or hold a hearing on its jurisdiction over broadband Internet access services in light of recent judicial and regulatory developments?
- Is there anything the FTC would ask of Congress in order to clarify jurisdictional divisions and/or facilitate the FTC's work with regard to protecting consumers in the broadband Internet access marketplace?

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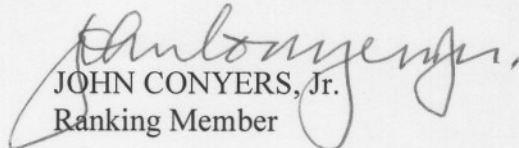
- Currently, most broadband Internet access services are provided over either a cable or traditional telecommunications infrastructure. Concentration clearly affects market dynamics in network industries that require cooperation, such as interconnection. Do you believe it would be appropriate for the same government agency to have merger review authority for all broadband Internet access service-related mergers?

Please respond to the questions raised in this letter no later than April 14, 2006. If you have questions, please do not hesitate to contact Robert Tracci of the majority staff at 202-225-3951 or Stacey Dansky of the minority staff at 202-225-6906. Thank you for your attention to this request.

Sincerely,



F. JAMES SENSENBRENNER, Jr.
Chairman



JOHN CONYERS, Jr.
Ranking Member